November, 1992

HONOR ROLL

392nd Session, Basic Law Enforcement Academy - July 8 through September 25, 1992

President:	*Deputy William P. Endicott - Mason County Sheriff's Department*
Best Overall:	*Officer David L. Miller - Mukilteo Police Department*
Best Academic:	*Officer David L. Miller - Mukilteo Police Department*
Best Firearms:	*Officer Officer Daryl M. Tryon - Seattle Police Department*
Best Mock Scenes:	*Officer Shawn M. Close - Longview Police Department*

****

NOVEMBER LED TABLE OF CONTENTS

****

NOTES FROM THE 9TH CIRCUIT COURT OF APPEALS

PREMEDITATED AND EXTENDED UNLAWFUL CUSTODIAL INTERROGATION OF SUSPECT AFTER HE REQUESTS AN ATTORNEY MAY RESULT IN CIVIL RIGHTS ACT LIABILITY - In Cooper v. Dupnik, 963 F.2d 1220 (9th Cir., 1992) the 9th Circuit Court of Appeals decides, by an 8-3 vote, that under the circumstances of this case law enforcement officers may be subject to civil liability under he Federal Civil Rights Act for ignoring a suspect's request for counsel and knowingly continuing to unlawfully interrogate him in the absence of counsel. Most jurisdictions which have addressed the question have held that a Miranda violation cannot result in law enforcement civil liability, but the egregious facts of the Cooper case triggered a contrary ruling by the 9th Circuit.

After two years of trying to catch the "Prime Time Rapist," a serial rapist in the Tucson area, a team of detectives from law enforcement agencies in the Tucson area arrested Michael Cooper based on a fingerprint match (the match was later determined to be erroneous). The lead detective had informed the other investigators in advance of his plan to ignore any eventual arrestee's assertion of Miranda rights. Interrogation would continue in the face of any assertions of the right to counsel or silence, he explained; the others had agreed to this strategy.

The strategy was based upon the officers' intent to keep Cooper off the witness stand with an alibi, insanity defense, or the like, in any eventual trial. The officers were aware that case law has made statements obtained in violation of Miranda admissible to impeach a defendant, even though such unlawfully obtained statements are not admissible in the prosecution's case-in-chief. This same unlawful strategy had been carried out with an earlier suspect in the case. Most of the executive staff of all agencies involved in the investigation were aware of the strategy, and they apparently had approved it.

When Cooper was arrested as a suspect in the case, he was taken to an interrogation room. The lead detective gave Miranda warnings in a joking manner. When Cooper said he did not wish to

talk to the officers but wished to talk to his lawyer, his request was ignored. He was questioned for several hours, despite his repeated requests for counsel and his continuing tear-laden denial of guilt.

Ultimately, the interrogation was abandoned. Thereafter, the case against Cooper unraveled when it was determined that the fingerprint "match" had been made by a totally unqualified officer and was erroneous. The only evidence against Cooper had been the fingerprint "match". Nonetheless, a statement was still made to the media at this point by the Tucson Police Chief that no negligence had been involved in Cooper's arrest.

Cooper sued in Federal court under the Civil Rights Act, asserting a violation of his Fifth Amendment rights against self-incrimination and his 14th Amendment due process rights. The law enforcement agencies were denied summary judgment in district court, but a three-judge Ninth Circuit panel reversed, holding that the Civil Rights Act does not apply to Miranda violations because Miranda is not a constitutional requirement. Thereafter, an 11-judge Ninth Circuit panel reversed the three judge panel, holding: (1) that the Miranda violation under these facts justified a Civil Rights Act suit on 5th Amendment grounds, and (2) that the conduct also "shocked the conscience", and therefore alternatively supported a Civil Rights Act suit for a due process violation.

LED EDITOR'S COMMENT:

We will not address the Ninth Circuit majority's legal reasoning other than to note that it appears on its face to be at odds with rulings in other jurisdictions. (At LED deadline a Petition for Review by the Arizona prosecutor was pending in the U.S. Supreme Court, but because the U.S. Supreme Court grants review in less than 1 % of the cases where review is sought, the odds are very low that further review will be granted -- hence, Cooper v.Dupnik will very likely become the established law of the Ninth Circuit, and hence the law for Washington officers.) We are not surprised by the Ninth Circuit's ruling in light of the facts articulated by the majority. If true, they describe a premeditated violation of Miranda, apparently approved in advance at the highest levels of the involved Tucson-area police agencies. To paraphrase an old legal maxim, bad facts make bad law.

There is a qualified lesson to be taken from the Cooper case. First, however, it must be understood that there is a good deal of complexity as well as some murkiness in that the law governing: (a) continuation of contact (it may be continued for clarification purposes only with a suspect who has made an ambiguous statement which might qualify as a request for counsel or an assertion of the right to silence) or (b) re-initiation of contact with a suspect whose unambiguous request for counsel and assertion of the right to silence previously has been respected. See previous LED entries at (a) June '89 LED:1-7 (article on "Initiation of Contact" rules); (b) Feb. '91 LED:01 (discussing Minnick v. Mississippi); and (c) Sept. '91 LED:10 (discussing McNeil v. Wisconsin). Now the lesson, for what it's worth. Because of the complexity and murkiness of the law in this area, the best approach that we can suggest in this context is the following:

> **If officers encounter what they perceive to be an ambiguous assertion of the right to silence or to counsel after giving Miranda warnings, they are probably not vulnerable to a Civil Rights Act suit if in seeking clarification from the suspect they make what is later determined to be a good faith mistake regarding their duty to stop questioning the suspect at that point.**

Similarly, if officers are faced with one of the several factual situations where the law is unclear on the right to reinitiate contact, the officers' decision to initiate contact in the good faith belief that it is lawful to do so is probably a low risk for civil liability. If, on the other hand, officers set out as in Cooper with a plan to violate Miranda and blatantly ignore a suspect's repeated unambiguous requests for counsel or assertions of the right to silence, they will likely be subject to civil liability. Where the lines will be drawn in the great variety of factual situations which lie in between, and which are bound to arise in the future, remains to be seen.

****

WASHINGTON STATE SUPREME COURT

"CHILD PORNOGRAPHY" WARRANT FAILS 4TH AMENDMENT PARTICULARITY TEST

State v. Perrone, 119 Wn.2d 538 (1992)

Facts and Proceedings: (Excerpted from Supreme Court opinion)

> In March 1988, a Seattle Police Department vice detective received a phone call from an Oakland, California, police officer who advised that he had obtained a mailing list of pedophiles, which had defendant's name on it. An undercover Oakland officer arranged with defendant to meet in California, after defendant returned from a trip to Seattle where he was to pick up adult and child pornographic films. Defendant wanted the films transferred to VHS tapes.
>
> In Oakland, on September 6, 1988, defendant delivered 82 films to the Oakland undercover officer for copying. Several of the films showed children involved in sexually explicit acts. Defendant indicated to the undercover officer that he had more films "like those" in Seattle and that he shared his films with other "collectors". When the officer asked defendant if he had any VHS cassettes of "kiddie porn" that the officer could copy, defendant said that his California and Seattle library of VHS cassettes could keep the officer "busy for a lifetime". The Oakland undercover officer obtained a search warrant to search defendant's car in California.
>
> In Seattle, in a coordinated effort with the California operation, the Seattle vice detective obtained the search warrant in question here. The warrant was drafted and executed by the vice detective, who determined what items to seize pursuant to the warrant. The warrant was based on her affidavit, which incorporated by reference the California warrant. These materials were submitted to a Seattle Municipal Court judge, along with a copy of the California affidavit in support of the California warrant. In the California affidavit, the Oakland undercover officer said that he and another officer had reviewed 17 of the 82 films obtained from defendant. He provided a description of nine of the films. Five showed children in sexually explicit activity and four showed adult females involved in sexual bestiality. The issuing magistrate considered all the materials submitted to him, but did not discuss with the Seattle vice detective the existence of probable cause or the

scope of the warrant.

The Seattle search warrant authorized seizure of the following items:

> Child or adult pornography; photographs, movies, slides, video tapes, magazines or drawings of children or adults engaged in sexual activities or sexually suggestive poses; correspondence with other persons interested in child pornography, phone books, phone registers, correspondence of papers with names, addresses, phone numbers which tend to identify any juvenile; camera equipment, video equipment, sexual paraphernalia; records of safe deposit boxes, storage facilities; computer hardware and software, used to store mailing list information or other information on juveniles; papers of dominion and control establishing the identity of the person in control of the premise; any correspondence or papers which tend to identify other pedophiles.

Exhibit 10.

On September 16, 1988, the Seattle vice detective served the search warrant on defendant's Seattle residence. One hundred ninety-seven films were seized, along with numerous magazines, books and projection equipment. Review of 86 of the films [*COURT'S FOOTNOTE: At the time defendant was charged, 86 films had been reviewed; the rest were not reviewed until later after a temporary restraining order obtained by defendant was lifted.*] indicated some of them depicted children under the age of 16 engaged in sexual conduct. Twelve of the magazines seized depicted minors in sexual acts.

The trial court granted defendant's pretrial motion to suppress all the evidence seized. The trial court concluded, and defendant does not challenge the conclusion, that there was probable cause for the seizure of child pornography. The trial court further concluded, however, that "[t]he materials submitted provided no probable cause for the seizure of adult pornography, drawings of children, and some of the other items described in the warrant." Conclusion of law 1. The court concluded the warrant was overbroad in that it authorized seizure of items for which there was no probable cause to search and it authorized seizure of lawful items. The trial court also concluded that some of the descriptions of items in the warrant were insufficient.

The trial court concluded that the warrant granted the officers executing the warrant too much discretion as to what to seize. The court held that the warrant was invalid in its totality and all the items seized pursuant to the warrant must be suppressed. The court concluded that "[t]he suppression of all the items seized under the search warrant practically terminates this prosecution on both counts." Conclusion of law 6.

The State appealed, arguing that defective language in the warrant should have been excised, and that the remaining language was sufficiently particular to satisfy the Fourth Amendment. A majority of the Court of Appeals panel agreed with the State that language in the warrant authorizing seizure of depictions of "children . . . engaged in sexual activities" was valid and was severable from the rest of the

warrant. State v. Perrone, 59 Wn. App. 687 (1990)[May '91 LED:16].

ISSUE AND RULING: After severing the clearly invalid portions of the seizure authorization of the search warrant, was the phrase "child . . . pornography" sufficiently particular to satisfy the Fourth Amendment? (ANSWER: No) Result: Court of Appeals reversed, King County Superior Court order suppressing all evidence seized under the warrant affirmed.

ANALYSIS:

The opinion for the unanimous Court covers the Fourth Amendment particularity issue in 18 pages of analysis. We will only briefly address the Court's analysis.

A primary principle underlying the Court's ruling is that where items presumptively covered by the First Amendment are sought -- this includes books, documents and movies (including even suspected "child pornography") -- the description of items to be seized under a search warrant must be quite exact. Coupling this principle with a ruling that there was no probable cause to seize most of the items described in the search warrant (because it is not illegal to simply possess any of the described items other than perhaps "child pornography), the Court is left with the question of whether the search warrant can be saved from a "particularity" attack (or seen another way, a "general warrant" attack) if all language in the warrant is severed from the warrant other than the words "child pornography."' While such severance may be permissible to save a search warrant from a particularity attack under some circumstances, the Court declines to do so in this case in light of: (1) what it sees as the indivisible construction of the search warrant before the Court, and (2) the generally higher standards of particularity imposed where items presumptively protected by the First Amendment are involved.

The Court indicates that, in the context of this case, the search warrant authorization for seizure would have been sufficiently particular if the warrant had used the definitions and language of chapter 9.68A RCW which prohibits possession of material depicting minors in sexually explicit conduct under certain circumstances. The Court declines to rule that this would be the only way to frame such a warrant, suggesting that a search warrant listing certain items by title might also be valid.

LED EDITOR'S COMMENT:

Obviously, vice officers and their deputy prosecutors will want to study Perrone for guidance in drafting search warrants for child pornography. The core of the warrant's seizure authorization probably should use the statutory definitions of RCW 9.68A.011, along with the titles of any previously identified items for which there is probable cause for seizure.

****

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **AUTOMATIC STANDING DOCTRINE IN LIMBO --** In State v. Zakel, 119 Wn.2d 563 (1992) the Washington State Supreme Court declines the prosecution's invitation to rule that there is no "automatic standing" doctrine under the Washington State Constitution (article 1, section 7). The Court of Appeals had agreed with the prosecution and had ruled that defendant Zakel, charged

with possession of a stolen vehicle, had no standing to challenge the legality of a search of that vehicle under the following facts (as described by the Court).

> On April 2, 1989, Kenneth Kirwan's 1989 Mazda RX7 was stolen from a motel parking lot in Portland, Oregon. In early April, Joseph Raab in Troutdale, Oregon, found that a license plate from his car was missing and an unfamiliar plate, which turned out to be from Kirwan's Mazda, was in its place. Raab notified the police.
>
> On April 12, 1989, at about 11 p.m., Aberdeen Police Officer Sidor saw a 1980 Mazda RX7 illegally parked and unattended in a loading zone in a commercial alley behind the Asher Apartments in Aberdeen. Sidor ran a license check and discovered that the plate on the vehicle had been stolen. Sidor approached the RX7 and looked on the dash for a vehicle identification number (VIN) on the car to determine whether the plates in fat matched the vehicle. He could not find the VIN on the dash. He attempted to open a door of the RX7, but could not from the outside because of damage to the car door. Sidor looked inside the car and saw several wallets, car keys, stereo equipment, cassette tapes and other items. He was concerned that some of these items, as well as the car itself, were stolen. Because the VIN was not visible on the dash, he tried to open the door to view the doorpost. The driver's door was unlocked, but damaged, so Sidor had to reach inside an open window to open the door using the inside latch. He looked for the VIN on the doorpost and the back of the door. While inside the car, Sidor opened two wallets lying on the console between the seats.
>
> As Sidor was examining these items, Zakel and Glen Jenkins came into the alley from the rear entrance of the Asher Apartments. Jenkins continued to walk down the alley, but Zakel stopped and asked Sidor what was going on. Officer Sidor replied by asking Zakel who owned the vehicle. Zakel said he did not know, and then asked the officer if anything was wrong. Sidor said, "No, not really." Zakel then left the alley, heading in the direction Jenkins had gone.
>
> Sidor released the RX7's hood and looked for the VIN under the hood. He found the VIN on the fire wall. He contacted the dispatcher, and learned that the VIN did not match the license plate of the car, and that the car was stolen. Sidor decided to leave the car in the alley and watch it. About an hour later, Zakel returned. Zakel was placed under arrest after he opened and entered the Mazda.
>
> Following Zakel's arrest in the early morning hours of April 13, 1989, Zakel made a statement to the Aberdeen police. Exhibit 2. He claimed, among other things, that he had received the car from a man named Robert Scott. Zakel had apparently been living in the car prior to his arrest. The police performed an inventory of the items found in the RX7. Numerous items found in the car appear to have been Zakel's personal property -- clothes, shoes, blankets, a pillow, as well as papers belonging to Zakel. Other items found in the car, such a tools, keys, stereo equipment, wallets, and cassettes, were identified at trial as belonging to the owners of several vehicles that had been stolen a few days prior to Zakel's arrest. These objects helped link Zakel to those other crimes. The RX7 itself had been damaged since the time it was stolen, and Zakel had obtained an estimate for repairs. Zakel was charged with possession of the stolen Mazda and the stolen property inside it, as well as three counts of taking and driving a motor vehicle

without the owner's permission.

The "automatic standing" doctrine was created by the U.S. Supreme Court in the 1960's. Under the doctrine, one who is in possession of property (even stolen property) when police make an illegal search of the property has automatic standing to challenge a search of that property if the crime charged has possession as an element (e.g., possession of stolen property or of illegal drugs).

The U.S. Supreme Court abolished this doctrine as a matter of Fourth Amendment law in a 1980 decision, ruling that the sole test for standing to challenge a search under the Federal Constitution is whether the person had a reasonable expectation of privacy in the area searched. With the abolition of the "automatic standing" doctrine, a car thief behind the wheel of a stolen vehicle (much less a person in Zakel's circumstance) would not have standing to challenge an unlawful search of that vehicle under the Fourth Amendment, because he would have no reasonable expectation of privacy in the stolen vehicle.

Later in 1980, the Washington State Supreme Court issued a decision in State v. Simpson, 95 Wn.2d 170 (1980) in which four justices joined in an opinion declaring that the automatic standing doctrine applies under the Washington Constitution's article 1, section 7. Then, in 1991, the Court of Appeals ruled in State v. Zakel, 61 Wn. App. 805 (1991) [Nov. '91 LED:13] that because a majority of State Supreme Court justices did not vote for the automatic standing rule in the 1980 Simpson case, there is no automatic standing doctrine under the Washington State Constitution.

However, the State Supreme Court has now ruled in Zakel that the Court of Appeals should not have reached the constitutional issue. The Supreme Court rules that, for purposes of establishing the "possession" element of he "automatic standing" doctine Mr. Zakel was not in "possession" of the stolen vehicle when the warrantless search occurred in this case, and that therefore he cannot challenge the search. "Possession" of a vehicle in any given case is determined from the totality of the circumstances, the Court declares, and takes into consideration such facts as whether the defendant was present at the vehicle, whether it was locked, whether the keys were inside it, whether it was lawfully parked in a public or private place, whether the defendant had any relationship to any of the nearby buildings, and whether the defendant had expressed or denied a possessory interest.

In other words, the Court has ruled that even if the automatic standing doctrine articulated in Simpson does apply under the Washington Constitution, Mr. Zakel can't utilize the doctrine because he was not in possession of the vehicle when the search occurred. And under a "reasonable expectation of privacy" test, Mr. Zakel, the car thief, had no expectation of privacy in the stolen vehicle. Accordingly, he cannot claim any violation of his rights under the Federal Constitution.

The Court leaves to another day the question of whether the automatic standing doctrine retains any life under the Washington Constitution.

Result: Grays Harbor Superior Court convictions for taking a motor vehicle without permission (three counts) and for first degree possession of stolen property (one count) affirmed.

(2) **DELAY OF A FEW HOURS BETWEEN END OF RAPE AND VICTIM'S REPORT DOES NOT DISQUALIFY REPORT FROM "EXCITED UTTERANCE" STATUS UNDER HEARSAY RULE --**

In State v. Strauss, 119 Wn.2d 401 (1992) the State Supreme Court rejects defendant's argument that the trial court erred in admitting a police officer's hearsay testimony regarding a rape victim's report of a rape. Defendant argued that the victim's report could not qualify under the "excited utterance" exception to the hearsay rule because there was a delay of a few hours between her escape from her attacker and her report to the investigating officer.

The Supreme Court's analysis is as follows:

> An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). In this case, the defendant does not dispute that a sexual assault is a "startling event", or that D.E.'s statement referred to this event. The key determination is "whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." Johnson v. Ohls, 76 Wn.2d 398 (1969). The record supports the trial court's determination that D.E. was still under the influence of the incident when she made her statement to Officer Johal. When the officer took D.E.'s statement, D.E. was very distraught, very red in the face and crying. At the time, D.E. appeared to be in a state of shock resulting from the incident.
>
> The defendant argues that the trial court erred in determining that D.E.'s statement to the officer qualified as an excited utterance because up to 3 1/2 hours might have passed between the time D.E. fled from Strauss until the time the officer met her at the gas station. The passage of time between the startling event and the declarant's statement is a factor to be considered in determining whether the statement is an excited utterance. The passage of time alone, however, is not dispositive. State v. Thomas, 46 Wn. App. 280, 284 (1986)**[May '87 LED:15]** (trial court did not err in determining that statements made after a 6- to 7-hour time span qualified as excited utterances); State v. Flett, 40 Wn. App. 277 (1985) (a statement made 7 hours after a rape was properly admitted as an excited utterance because of the declarant's "continuing stress" during that time period).
>
> The trial court's determination that a statement falls within the excited utterance exception will not be disturbed absent an abuse of discretion. The record reflects that the trial court did not abuse its discretion in this case.

[Some citations omitted]

Result: King County Superior Court sentence (not the underlying conviction) for second degree rape reversed on grounds unrelated to the issue addressed above; case remanded to Superior Court for further sentencing proceedings.

****

WASHINGTON STATE COURT OF APPEALS

WARRANTLESS ARREST ON PORCH HELD TO BE VIOLATION OF PAYTON RULE

State v. Solberg, 66 Wn. App. 66 (Div. I,1992)

Facts and Proceedings: (Excerpted from Court of Appeals majority opinion)

> On April 27, 1989, Seattle Police Officer Dennis Brown received an anonymous telephone call from a woman who identified herself as a real estate agent. This woman told Officer Brown that, while she was showing Solberg's residence to a prospective buyer, she was unable to show the basement because it was locked. She also stated that she smelled a strong odor of marijuana at the residence.
>
> The following day, April 28, Officers Paulsen and Brown went to Solberg's residence to investigate the anonymous tip. Both Officer Paulsen and Officer Brown testified that upon leaving their car, they smelled marijuana. They also noticed that the east side of the house was mildewed, the paint was peeling off of the house, and several of the basement windows were blackened.
>
> Based on what they had smelled and seen, Officer Paulsen and Brown executed an affidavit to Seattle City Light to obtain the power consumption records for Solberg's residence. An official at Seattle City Light told them that the power consumption records were consistent with the operation of four or five halide grow lamps. Officer Brown testified that, at this point, he felt they had probable cause to secure a search warrant. We agree.
>
> Officers Paulsen and Brown then returned to Solberg's residence for a detailed description of the house for the search warrant. When they arrived at the house, they noticed a van in the driveway that had not been there before. Because the officers were worried that Solberg might be dismantling the grown farm, they decided to approach the house before securing a search warrant.
>
> The officers knocked on the door, and Edward Bowley, a codefendant, answered and stopped out onto the porch. Officer Brown told Bowley that they were "investigating a possible grow farm here, and we're going to get a search warrant, but before we do anything or ask any questions, we're going to read you your Miranda Rights." At this point, Solberg joined Bowley and the officers on the porch. Officer Brown then read Solberg and Bowley their Miranda rights. Officer Paulsen said that he suspected four or five halide grown lamps, and Solberg responded, "No, I have four".
>
> Other officers arrived at the residence to wait with Solberg and Bowley while Officers Paulsen and Brown left to secure a search warrant. During the 3 hours it took to secure a search warrant, Solberg and Bowley were not allowed to leave the premises. Although the testimony at the hearing was conflicting, the trial court found on substantial evidence that the officers did not enter or search the house until Officers Paulsen and Brown returned with the search warrant.

A search of the residence revealed 496 marijuana plants, 473 grams of cut marijuana, halide lamps, transformers, timers and other items necessary for grow farms.

Solberg moved to suppress the evidence found during the search on the basis that he was unlawfully arrested, that his residence was unlawfully seized and that the affidavit in support of the search warrant lacked probable cause. The court found that Officers Paulsen and Brown had probable cause to arrest Solberg, thus, the court held that Solberg was lawfully arrested. The court also found that, during the 3-hour wait for the search warrant, the house had not been seized. Finally, the court found that before the search warrant was obtained, no officers entered the house, that the search pursuant to the search warrant was lawful and that the affidavit in support of the search warrant contained probable cause. The court therefore refused to suppress the marijuana and other evidence found in Solberg's house.

Solberg waive his right to a jury trial and the court found him guilty of the crime charged.

ISSUE AND RULING: Did the officers violate the rule established in Payton v. New York by arresting Solberg on his porch? (ANSWER: Yes, rules a 2-1 majority) Result: King County Superior Court conviction for possession of a controlled substance with intent to manufacture or deliver affirmed.

ANALYSIS: (Excerpted from Court of Appeals majority opinion)

[In] Payton v. New York, 445 U.S. 573 (1980) the [U.S.] Supreme Court held that, absent consent or exigent circumstances, the Fourth Amdnement prohibits the warrantless entry into an individual's home to make a felony arrest even though probable cause exists to arrest the individual. State v. Holeman, 103 Wn.2d 426 (1985) (applying the same rule to Const. art. 1, § 7).

The initial issue in the instant case is whether Solberg was arrested in his home. The State argued below, and seems to be arguing on appeal, that because Officers Paulsen and Brown read Solberg his rights on his porch, Solberg was not arrested in his home.

In State v. Carlow, 44 Wn. App. 821 (1986)[Dec. '86 LED:17], two police officers went to the defendant's home, without a warrant, to question him. They knocked on the door and the defendant answered and stepped out onto the porch. At this point, the officers arrested the defendant. On appeal, the court upheld the validity of the arrest without a warrant on the basis that the defendant was arrested outside of this home, that is, while on the porch of his home.

In Holeman, however, the defendant was arrested, without a warrant, while standing in the doorway of his home. On appeal, the court held that the arrest was unlawful as the defendant was arrested in his home without a warrant and absent exigent circumstances. The court explained:

> It is no argument to say that the police never crossed the threshold of

> David's house. It is not the location of the arresting officer that is important in determining whether an arrest occurred in the home for Fourth Amendment purposes. Instead, the important consideration is the location of the arrestee. . . . A person does not forfeit his Fourth Amendment privacy interests by opening his door to police officers. . . . A person's home can be invaded to the same extent when the police remain outside the house and call a person to the door as when the police physically enter the household itself. Our state constitution guarantees that
>
> > No person shall be disturbed in his private affairs, or his home invaded, without authority of law.
>
> Const. art. 1, § 7. Here the police did not have the proper authority of law, i.e., a warrant. Consequently, this first arrest of David was unlawful.
>
> Here, the officers knocked on the door and Bowley answered and stopped onto the porch. When Solberg heard that police were at the door, he joined Bowley and the officers on the porch. When both Solberg and Bowley were on the porch, it is uncontested that the officers placed them under arrest. On the basis of Holeman, we hold that the arrest took place in Solberg's home and we reject the premise that an otherwise invalid warrantless arrest may become valid depending upon whether a suspect steps out onto his or her porch when answering the door as opposed to remaining standing in the doorway of his or her home. To distinguish between one's home and the porch of one's home for Fourth Amendment purposes is artificial in a case such as this were the police knock on the door and ask to speak to the occupants of the home. As stated by the court in Holeman, "[a] person's home can be invaded to the same extent when the police remain outside the house and call a person to the door as when the police physically enter the household itself."
>
> To lawfully arrest a suspect in his home for a routine felony, the police must have a warrant or there must be exigent circumstances for the arrest to be valid. . . . Here, it is undisputed that Officers Paulsen and Brown did not have a warrant nor does the State allege that there were exigent circumstances. Thus, we hold that, even though the police had probable cause to arrest Solberg, without a warrant or exigent circumstances, Solberg was unlawfully arrested.

[Footnotes, some citations omitted]

LED EDITOR'S NOTES: Two other search-and-seizure issues addressed at length by the Court of Appeals were: (1) whether the officers lawfully secured Solberg's house from the outside while they sought a search warrant, and (2) whether there was probable cause to support issuance of the search warrant. The State prevailed on both issues, and, because probable cause was established by evidence obtained prior to and independent of Solberg's arrest on the porch, the Court ruled the evidence obtained in the search to be admissible.

LED EDITOR'S COMMENT: In our opinion, the majority's ruling on the Payton issue, to the extent that it holds that police may not make a warrantless arrest of a person who has voluntarily stepped onto his unenclosed front porch, is inconsistent with the Holeman and Carlow cases cited by the Court, as well as a prior Division I Court of Appeals decision in

State v. Bockman, 37 Wn. App. 474 (Div. I, 1984) [Nov. '84 LED:14]. Moreover, the ruling is contrary to almost every ruling we have ever seen on this issue from other jurisdictions. We had a law clerk make a list of cases from other jurisdictions on the issue of whether it is lawful to make a warrantless arrest in this factual context under Payton. His research indicates that all four federal circuits and all (approximately eleven) but one of the state courts considering such porch arrests found them lawful. The clerk's four-page memo is available to our readders on request.

JUVENILE DETAINEE'S CLAIM THAT MAN ON MOTORCYCLE SELLING MARIJUANA DOES NOT PROVIDE REASONABLE SUSPICION FOR STOP OF THE MAN ON THE BIKE

State v. Hart, 66 Wn. App. 1 (Div. I, 1992)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> On August 26, 1989, [two detectives] of the Everett Police Department's Drug Abuse Reduction Team (DART) were patrolling a "high narcotics activity area" near several apartment complexes. At approximately 8:30 p.m., the detectives stopped to investigate a vehicle parked in the middle of the street with its engine running.
>
> The detectives approached the vehicle and began speaking with its two juvenile occupants. While speaking with the juveniles, [one detective] observed an open container of alcohol inside the vehicle. One of the juveniles told [the detective] that "there was an individual selling marijuana" in a nearby apartment complex. The juvenile stated that the individual "was dressed in black and . . . was riding a motorcycle."
>
> As the juvenile related this information to [the detective], a person dressed in dark clothing (later identified as Hart) rode his motorcycle out of a nearby apartment complex in their direction. As Hart approached the area where the detectives were standing, the juvenile with whom [the detectives were] speaking pointed to Hart and stated, "That's him."
>
> [The detectives] immediately stopped Hart and asked him for identification. In the course of the ensuing detention, [one of them] conducted a pat-down search for weapons. While removing a "hard object" from an inside pocket of Hart's jacket which he believed could have been a weapon, [he] saw a clear bag containing green vegetable matter protruding from another pocket which he suspected to be marijuana.
>
> Hart was arrested and subsequently charged by information with possession of a controlled substance with intent to deliver in violation of the Uniform Controlled Substances Act, RCW 69.50.401(a). At a pretrial suppression hearing, [one of the detectives] testified concerning the basis for his investigatory stop of Hart as follows:
>
> Q. What specific information did you have that caused you to contact Mr. Hart as an individual?
> A: Before I contacted Mr. Hart I was involved in a traffic stop with two

minors that eventually had open container [sic] in their car. As I was talking to one, he stated through a brief conversation that there was an individual selling marijuana, an individual was dressed [sic] in black and was riding a motorcycle.

Q. Did he tell you anything about where that individual lived?
A. No.
Q. Did he tell you how he knew that that particular person was selling marijuana?
A. He knew of the person selling marijuana from the fact that he was going to score some, he said, some bud in the area, and he told that [Hart] was in the area riding his bike.
Q. Had he ever actually been approached by Mr. Hart to purchase marijuana?
A. He didn't specify that that evening, but he indicated he knew of [Hart] from perhaps -- he didn't say when or if he had previous contacts.
Q. As you were talking to his individual, did you have his name . . .?
A. Not at that time, no.
Q. Did you get that individual's name while you were stopping Mr. Hart?
A. Yes, I did.
. . .
Q. Did you have any other information that you obtained prior to stopping Mr. Hart?
Q. No, I didn't.

[The detective] also testified that he did not include that informant's name in his police report because the informant had asked to remain anonymous out of fear that Hart would retaliate against him. He also acknowledged that neither the informant nor his companion was cited for the crime of minor in possession of alcohol. There was no evidence presented that either of them could be located again.

The trial court denied Hart's motion to suppress and entered the following written findings and conclusions.

> The evidence found in the search is admissible as the result of a lawful Terry stop. Viewing the totality of the circumstances the officers had a reasonable suspicion based upon articulable facts to stop the defendant. The officers were in an area of high drug trafficking [sic], with information that the defendant was selling marijuana, had his physical description and a visual identification by the minor. It would have been unreasonable under the circumstances to require the police to look the other way.

After a stipulated trial, Hart was found guilty as charged.

[Officer names deleted]

ISSUE AND RULING: Did the juvenile's claim that the man on the motorcycle was selling marijuana provide reasonable suspicion justifying the stop of the man on the cycle? (ANSWER:

No) Result: Snohomish County Superior Court conviction for possession of a controlled substance with intent to deliver reversed.

ANALYSIS:

The Court of Appeals declares that an investigative stop of a suspect may be based on information provided by an informant only if: (1) the informant is credible, and (2) the information provided by the informant is reliable. Finding that the initial juvenile detainee here was presumptively credible because he had a strong motive to give accurate information to the officers, the Court of Appeals turns to the question of whether the information provided was reliable.

The Court declares that there are two ways information about a possible crime can be shown to be reliable -- (a) BASIS OF INFORMATION: reliability is shown if the report contains objective facts based on first-person observations by the informant, or (b) CORROBORATION: reliability is shown if otherwise conclusory allegations of criminal activity are corroborated by the officer's observation of suspicious activity. As to the informant's "basis of information" the Court of Appeals notes that the informant's assertion as to the cyclist's drug activity was purely conclusory and hence didn't provide reasonable suspicion by itself.

And as to the officers' corroboration, the Court of Appeals apparently holds that the mere facts that: (i) the person described was in the area and (ii) that this area was known as a "high narcotics activity area" were insufficient corroboration to justify the stop. The fact that Hart was in the area was innocuous (in other words, totally consistent with non-criminal activity), and the fact that the area in question was a high drug activity area is generally of little value on the reasonable suspicion question.

The Court of Appeals implies that the stop in this case would have been justified if either: (a) the juvenile informant had described a first person observation of drug possession or drug dealing by Hart, or (b) the officers had corroborated the report by observing Hart engaging in suspicious conduct consistent with drug possession or drug dealing.

LED EDITOR'S COMMENT: This case presented a close question in a slightly murky legal area. We believe that, where citizen reports of crime are involved, the Washington Court of Appeals has erroneously blurred the line between "reasonable suspicion" and "probable cause" in several cases over the past decade. This blurring of the line has become fairly entrenched, so officers should make every reasonable effort to pursue "basis of information" with complainants before making Terry stops for reported "drug-dealing", "DWI," etc. On the other hand, prosecutors should continue to point out that "reasonable suspicion" requires a lesser quantum of suspicion than "probable cause," as was emphasized by the U.S. Supreme Court in Alabama v. White, 110 L. Ed.2d 301 (1990) August '90 LED:07.

BOOKING INVENTORY OK BECAUSE OPPORTUNITY TO POST BAIL PROVIDED

State v. Ward, 65 Wn. App. 900 (Div. III, 1992)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> At approximately 5:20 a.m. on February 25, 1990, Yakima Police Officer James Giles observed Mr. Ward in the driver's seat of a parked car. The engine was running, but Mr. Ward was leaning against the steering wheel with his eyes closed. Officer Giles approached and inquired through the open driver's window whether there was a problem. Mr. Ward responded he was just trying to stay warm in his car. The officer then asked Mr. Ward for identification. Unable to locate his wallet, Mr. Ward provided his name and birth date verbally. The officer asked him to wait a minute, then walked to the back of the car and used his portable radio to run a driver's license check through the police dispatcher. The dispatcher advised Officer Giles the City of Yakima had a warrant for Mr. Ward. Officer Giles asked Mr. Ward to step from the car, informed him of the warrant, arrested him, placed him in handcuffs, frisked him for weapons, placed him in the rear seat of the patrol car and drove to the alley behind the Yakima Police Department. A clerk brought the arrest warrant (for failing to appear on a shoplifting charge) to Officer Giles, who read it to Mr. Ward. Officer Giles testified he advised Mr. Ward bail was $325, but Mr. Ward replied he did not have that kind of money. Officer Giles then transported Mr. Ward to the county jail for booking. Mr. Ward did not deny the warrant was read to him; he testified he did not remember because he was asleep and did not awaken until they arrived at the county jail.
>
> As part of the booking procedure, Mr. Ward was required to empty his pockets into a pass-through drawer at the booking window in the jail so the contents could be inventoried. A folded shiny paper packet was observed under the clear cellophane wrapper of Mr. Ward's cigarette package. Officer Giles, suspecting the bindle contained cocaine, opened it and observed a white powder. The substance tested positive for cocaine.
>
> A hearing was held to determine whether suppression of the cocaine as evidence was required. The court found Mr. Ward was given an opportunity to post bail, but indicated he could not do so, and concluded the booking and inventory search were proper.

ISSUE AND RULING: Did the procedure which preceded the inventory of Ward's personal effects following his arrest on a warrant satisfy the Gloria Smith case which requires that a prior opportunity to post bail be given the arrestee? (ANSWER: Yes) Result: Yakima County Superior Court conviction for possession of a controlled substance affirmed.

ANALYSIS: (Excerpted from Court of Appeals ruling)

> Mr. Ward contends the State violated RCW 10.31.030 by not giving him an opportunity to post bail and avoid the inventory search required for booking. He argues if the inventory search was not lawful the cocaine should have been suppressed, citing State v. Smith, 56 Wn. App. 145 (1989)[March '90 LED:12].

> Mr. Ward's reliance on State v. Smith, supra, is misplaced. In Smith, at 150, the court held the police officer violated RCW 10.31.030 by not informing Ms. Smith of her right to post bail before her purse was searched. That was not the case with Mr. Ward. Officer Giles read him the warrant, informed him bail was $325, and was told Mr. Ward did not have that kind of money. Mr. Ward acknowledged he was familiar with the procedure for obtaining bail from a bondsman and knew he had a right to post bail if he could do so, but claimed he did not wake up enough to assert his rights until after the cocaine was found.
>
> Although this court makes an independent evaluation of the evidence presented at a suppression hearing, deference is given to the trial court's determination of credibility. The court's finding Mr. Ward was given an opportunity to post bail is supported by substantial evidence. The inventory search of Mr. Ward's person, conducted in accordance with established procedures before booking him, was a reasonable, valid search pursuant to a lawful custodial arrest.

[Footnotes, some citations omitted]

INFORMANT CREDIBILITY ESTABLISHED BUT DEFENSE CLAIM THAT WARRANT AFFIANT MADE FALSE STATEMENTS REQUIRES THAT RECORD BE MADE OF IN CAMERA HEARING

State v. Selander, 65 Wn. App. 134 (Div. II, 1992)

Facts:

After learning from a confidential informant that the informant had seen a marijuana grow operation in Rodney H. Selander's garage, a Cowlitz County Sheriff's deputy applied for a search warrant. Among other things, the deputy's affidavit described what the informant had observed. The affidavit also addressed the facts regarding the credibility of the informant, as follows:

> The informant has in the past given me information which has proven to be reliable. Also as stated the informant has been known to me for over 20 years and I do consider him to be reliable and has in the past given me information that has proven to be reliable and true. The information that he has given me in the past was concerning a stolen chain saw from the Weyerhaeuser Co. [T]he saw was recovered and subjects arrested and convicted for the theft of the crime.

The warrant was issued and executed by members of a drug task force. The officers found 12 large marijuana plants and many smaller plants in the rear of the garage.

Prior to trial on drug charges, Selander moved to suppress the evidence, contending that the officer-affiant had made false assertions in the affidavit. After a hearing on the motion, the trial court decided that it needed to conduct an in camera hearing with just the confidential informant and the prosecutor in attendance. At the in camera hearing, the prosecutor urged the judge to record the hearing, but the judge said that he didn't feel it was necessary to record his conversation with the confidential informant.

In a subsequent pre-trial proceeding, Selander asserted that the affidavit did not establish the credibility of the confidential informant. At that proceeding the affiant-officer revealed that he had

just learned that the informant had not seen the marijuana by looking through a garage window (as was stated in the affidavit), but that the informant had now told the officer that he had entered the garage to make the observations.

Ultimately, the trial court rejected Selander's challenges to the search warrant and found him guilty of possession of marijuana with intent to manufacture in violation of RCW 69.50.401(a)(1).

ISSUES AND RULINGS: (1) Did the affidavit establish the credibility of the informant under the Aguilar-Spinelli two-pronged test for informant-based probable cause? (ANSWER: Yes); (2) Was it error for the trial court not to record the in camera hearing? (ANSWER: Yes) Result: UCSA conviction vacated; case remanded for a recorded in camera hearing.

ANALYSIS:

(1) Credibility of Informant

On the issue of the informant's credibility, the Court of Appeals declares:

> Selander contends that the search warrant affidavit fails to establish the necessary reliability of the informant and, thus, does not support a probable cause finding. "[I]n evaluating the existence of probable cause in relation to informants' tips, the affidavit in support of the warrant must establish the basis of information and credibility of the informant." The two prongs of this test have independent significance, and satisfaction of both is necessary to establish probable cause.
>
> Selander only contends that the affidavit failed to establish the credibility of the informant. There are two ways to satisfy this "veracity" prong: (1) by establishing the informant's credibility with his prior conduct or standing in the community; or (2) if nothing is known about the informant, showing that the facts and circumstances under which the information was furnished reasonably support an inference that the informant is telling the truth.
>
> In State v. Woodall, 100 Wn.2d 74 (1983), the court distinguished facts supporting reliability from an affiant's conclusory statements. Because the issuing magistrate is "detached and neutral", sufficient facts must exist for a finding of reliability. The magistrate is not simply rubber-stamping the opinion of an officer that he has probable cause.
>
> The facts here establish the informant's reliability. Reliability is sufficiently shown if the informant has given information in the past which has led to a conviction. That being the case here, the affidavit adequately established the informant's reliability.

[Some citations omitted]

(2) In Camera Hearing

In a case involving a search warrant grounded entirely in a confidential informant's report, under the ruling of the State Supreme Court in State v. Casal, 103 Wn.2d 812 (1985) Aug. '85 LED:11, the trial court should hold an in camera hearing to determine the truthfulness of the affiant-officer if the defendant makes a preliminary showing that reasonably suggests that the affiant-officer may

have knowingly or recklessly made a false statement about the informant's report. The Court of Appeals declares:

> Selander made the necessary preliminary showing entitling him to a Casal hearing. At the October 12, 1989, hearing, he contended that the physical configuration of his building made it impossible to see the marijuana plants from the garage door and that the informant could only have seen his grow operation by unlawfully entering his building because the building was always locked. He also showed that [the affiant officer] had been on his premises and should have realized that the informant could not have seen the marijuana the way he or she had said. Also, at the second hearing the officer acknowledged that the informant had crawled through the garage. Finally, the trial court was apparently persuaded that Selander was entitled to a hearing and did conduct one.

The Court of Appeals then goes on to hold that the trial court erred in not creating a (sealed) record of the in camera hearing. The case is therefore sent back to the trial court for a recorded in camera hearing, Selander's conviction is reversed; however, if the trial court finds in the in camera hearing that the officer-affiant did not make any deliberate misstatements or reckless declarations of false information, then Selander's conviction is to be reinstated.

****

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

MANDATORY ARREST PROVISION OF RCW 10.31.100 DOES NOT CREATE ACTIONABLE DUTY TO SEARCH FOR ABSENT DOMESTIC VIOLENCE ASSAULT SUSPECT -- In Donaldson v. Seattle, 65 Wn. App. 661 (Div. I, 1992) Division I of the Court of Appeals reverses a judgment on a jury verdict in a civil suit for wrongful death against the City of Seattle brought by the estate of a woman killed by a man against whom she had obtained a "no-contact" order. Ruling that the city had no actionable duty under the "public duty doctrine" to protect the victim from her killer, the Court of Appeals grants judgment to the city by a 2-1 vote.

Among the numerous issues in the case was the question whether the mandatory arrest provision of RCW 10.31.100(2) -- which mandates arrest in certain domestic assault situations where the assault has occurred within the preceding four hours -- imposes an actionable duty on police to conduct follow-up investigations to search for the perpetrator when: (a) the four-hour time period has not expired, and (b) the alleged perpetrator is absent from the scene. The majority says "no", while the dissenting Judge Coleman argues that the four-hour time limitation of the statute suggests a legislative intent to create such a duty.

Result: King County Superior Court judgment granted to the City of Seattle.

****

CONSENT TO SEARCH AFTER OFFICERS ASSERT THEY'LL "SEEK A SEARCH WARRANT"

In the September 1992 LED at 20, we suggested that officers not say to persons from whom they are seeking consent to search that they'll "obtain" or "get" a search warrant if

such persons exercise their right to refuse consent. The better approach is for officers to state that they'll "seek" or "apply for" a search warrant if consent is refused. A case supporting the latter approach is State v. Smith, 115 Wn.2d 775 (1990) March '91 LED:06.

****

NEXT MONTH

The December 1992 LED will include our annual subject matter index, along with entries on three recent decisions from the Washington State Supreme Court --

(1) State v. Reding (No. 58462-1, issued September 10, 1992): (a) holding that custodial arrest is automatically authorized without need for additional justifying facts for each of the traffic crimes listed at RCW 10.31.100(3), and (b) expressly overruling a contrary decision of the Court of Appeals in State v. Stortroen, 53 Wn. App. 654 (Div. I, 1989) Aug '89 LED:14;

(2) State v. Clayton Donald Smith (No. 58374-9, issued September 10, 1992): (a) ruling that a briefly delayed search of a "fanny pack" which came loose from an arrestee during the course of a custodial arrest was a lawful search "incident to arrest," and (b) overruling a contrary decision by the Court of Appeals in the same case reported at 61 Wn. App. 482 (1991) Sept. '91 LED:16; and

(3) Auburn v. Brooke (No. 57867-2) and Seattle v. Wandler (No. 57972-5): holding that the "essential elements" rule for charging documents applies to officer-issued criminal citations, as well as complaints and informations.

****

HURRICANE ANDREW DISASTER FOR FLORIDA LAW ENFORCEMENT PERSONNEL

The City of Bellevue Police Department has started a non-profit organization to assist the many officers and support staff of the Coral Gables (Florida) Police Department who lost their homes in HURRICANE ANDREW. Tax deductible donations may be made by checks made payable to "C.G.P.O. Hurricane Relief Fund." Checks may be mailed to Bellevue Police Department, Attention Officer Mangione, P.O. Box 90012, Bellevue, WA 98009-9012. If you have questions, you may contact Bellevue Police Department at (206) 455-6952.

****

The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions expresses the thinking of the writer and does not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.